

CHANGES IN THE ROLES OF COMMON LAW, EQUITY, AND STATUTE IN THE STUART CENTURY

THE CHANGES in the constitutional structure of England during the Stuart century seem to be enjoying very critical re-examination and re-appraisal, and out of the recent studies¹ much more sympathy for the medieval legal and political structures, and for the men who continued to espouse them in that time of foment, seems to be emerging. Much less attention, however, seems to have been given to the impact of these constitutional changes and of the thought and circumstances which produced them on the conceived roles of courts, chancellor, and parliament in the area of private law. This paper will present some observations on this subject, but without pretense that they should be regarded as final or definitive.

I

In today's prevailing political thought the secular state is sovereign and law is its product and instrument. In the medieval constitution, to which that of England conformed, law was supreme and the authorities spiritual and temporal were its instruments. The essence of authority spiritual or temporal was jurisdiction, or responsibility for the declaration of the law rather than the right to make it.² To spiritual authority, vested in the Church of Rome, belonged exclusive jurisdiction to state the revealed law and supreme or final authority, even over temporal rulers, to determine the spiritual and moral qualities of all human actions.³ To temporal authority, which might be vested in various secular political entities, belonged jurisdiction to promote and maintain such order or

law in the lives of men as, considering the circumstances of existence in the particular time and place, would contribute most to their common good as men living under God.

In medieval England this temporal jurisdiction was not located in any one person or institution; it was distributed among the king's courts, the king's chancellor, the king acting alone in the area of traditional prerogative, and the king acting in concert with his council or parliament, all of whom acted in accordance with established but dynamic forms and procedures themselves regarded as part of the previously specified order or law.⁴ These several institutional entities shared the same authority of jurisdiction, all being deemed to participate in the declaration of a positive law for England consistent with English culture and conceived to be just in the sense of being in harmony with the Eternal Law. Their functions in the exercise of the authority of jurisdiction varied, of course, but the variations in function were not conceived of as differences in purpose or objective.⁵ The courts found and applied to particular controversies the law which had been specified before, either explicitly or implicitly, by custom, judicial action under the writs, or enactments; the king's chancellor specified rules of law for causes brought before him for which the previously declared law was inadequate to do justice; and the king, usually in parliament, confirmed, specified, or respecified general rules deemed to reflect the true law or good order. The law which these several English temporal authorities cooperatively declared represented the sum total of those rules of order which reasoned judgments on the experiences of English life had indicated to be conducive to the common good of men living in England.⁶ This is not to say that English law was the only imaginable just law for man in society; but just as Roman law

could be regarded as the embodiment of justice for men in the Romance cultures, to be altered only as the changes in conditions of life indicated that other specifications would accomplish greater justice, so too was English law to be respected until changes in English life required its alteration. As such English law was fundamental law.⁷ It was not unchangeable, but no agency of jurisdiction could do more than adjust it as necessary for good order, each according to its own function.⁸

The Tudors initiated the destruction of this medieval English Constitution by transferring final spiritual jurisdiction from the Church of Rome to authorities formerly possessing temporal jurisdiction alone, but left essentially undisturbed the traditional distribution of temporal jurisdiction and respect for the fundamental law. Thus the temporal authorities collectively became more absolute in the sense that the Church could not censure their actions as violations of faith or morals, but their respective jurisdictional functions remained separated and limited by tradition and subject to the fundamental English law. The first Stuart, however, challenged the sacredness both of this distribution of temporal jurisdiction and of the fundamental law. James I not only claimed all spiritual and temporal jurisdiction for the person of the king, but also claimed the right to ignore the concrete fundamental law if he chose and to state the law of the land in accordance with his reason and his judgment. He acknowledged an obligation to declare law and to organize governmental institutions consistently with the Divine Will, but claimed exclusive authority so to do, either alone or through such persons as he chose. The fundamental law and the traditional distribution of jurisdiction among courts, chancellor, and king in council or in parliament could continue at his

sufferance, but no longer. The king was under God, but sovereign in authority. Positive law would have to be identified with the royal will. The jurisdiction of courts, chancellor, and parliament would be reduced to the exposition, interpretation, and application of the royal will. Custom itself would derive its authority from the tolerance or implicit approval of the royal will.⁹

No single incident more dramatically illustrates this repudiation of the components of the medieval constitution, divided or distributed jurisdiction under fundamental law, than the famous encounter between James I and Chief Justice Coke. The king, in a conference with Coke, affirmed his right to replace his justices and decide any controversy personally. Coke objected that the king did not have power to do so and that controversies were to be decided in courts of justice and according to law. James replied that he had thought the law to be founded on reason, and that he had reason as well as the judges. Coke, according to his own account, explained that the reason on which the common law was founded was an "artificial reason and judgment of law," as opposed to mere natural reason, the mastery of which required study and experience not possessed by the king. James objected that this would place the king under the law, "which was treason to affirm." Coke thereupon relied on Bracton's words, "That the king ought not to be subject to any man, but under God and the law."¹⁰

It is usual to interpret this encounter as indicative of James I's challenge to the distribution of jurisdiction and to the fundamental law. What is not always so clearly stated, if at all, is the very correct medieval import of Coke's words that the common law, which undoubtedly he used here to mean the whole of the law of England, was fundamental and binding

because it represented the principles and rules of true order or law for men in the English culture. Another system of law, no matter how rational or in keeping with man's nature, whether royal law or Roman law, could not supplant the English law without prejudice to Englishmen.

It cannot be said that the Stuarts changed the Tudor constitution, for their theories never prevailed in fact; but the controversies raised by James I and Charles I weakened it by raising doubts as to the efficacy of the law as a foundation and guarantee of good order. If the Tudors had begun the movement by placing final jurisdiction in matters spiritual under secular authority, they had not, at least, placed themselves above the fundamental law and the political institutions which had enjoyed authority of temporal jurisdiction. The Stuarts claimed to be above both, rejecting all notion of a concrete fundamental law and transforming the temporal authority of jurisdiction according to law into an authority to declare any scheme of positive law which Stuart reason might judge to be consistent with the Divine Will. Had their ideas prevailed every institutional means of opposition to a law not consistent with good order would have been removed. In theory the Crown would have been subject to Divine Law, but the king would have been its supreme interpreter. Had the ideas of Hobbes prevailed at this time, even this non-institutional limitation on the Crown would have been removed and Stuart claims to sovereign jurisdiction would have been transformed into exclusive sovereign power to make the law. But neither the theories of the Stuarts nor those of Hobbes met with general favor. Finally it was the parliament which emerged with claims of right to sovereign jurisdiction to declare the positive law; and although under the influence of Locke a secular natural law began to

supplant the Divine Law as the source of the fundamental concepts or order, it could truly be said that Parliament's role was still regarded as law-declarative rather than law-creative. Yet Parliament did not seek the exclusive exercise of its newly sovereign jurisdiction; the courts and chancellor continued to exercise their former jurisdictional roles. There had been a real change, nevertheless. Slowly the courts and chancellor came to realize they continued to exercise authority of jurisdiction not as equals of the parliament, but subject to it, and with this realization they slowly began to think of their roles in terms of the interpretation and application of law rather than its declaration.

II

The common law courts when dealing with the unwritten or unenacted private law—the common law in the narrow sense—at first seemed to feel little impact from the changes in fundamental law theory. To the end of the Tudor period the unwritten common law was still custom. For the most part custom was evidenced by the repeated decisions of the courts, and the courts might always consider whether a custom as it appeared in their preceding decisions gave rise to justice in the particular circumstances at hand. Even a long line of decisions could be ignored if to apply the rule would have led to “inconvenience or injustice.”¹¹ There was no suggestion of the 19th century strict rule of precedent that the courts are bound by their previous decisions, whether just or unjust. In the Exchequer Chamber a decision was referred to as “a precedent for all subsequent cases” as early as 1602,¹² but it should be questioned whether this “precedent” was deemed to be any more binding on the court than a statute would have been on parliament. Plucknett believes nothing

of the kind appeared in the King's Bench or Common Pleas at this time.¹³ A few years before, in *Slade's Case* (1596), a decision famous as the starting point of modern contract law, Coke had expounded his views on the use of previous decisions, and he had not held them to be more than persuasive.¹⁴ Nevertheless, as the Stuart century advanced there was an increasing awareness of some obligation to respect previous judicial formulations of the law. A tract written in 1649 by John Warr, entitled "The Corruption and Deficiency of the Laws of England," even complained that the justices were too prone to follow precedent rather than reason.¹⁵ In 1686 the Exchequer Chamber declared that a rule settled by all the judges might not be questioned thereafter;¹⁶ in 1670 Chief Justice Vaughan distinguished *rationale* and *dictum* and suggested that a court ought to follow its own previous decisions, but need not adhere to one by another court if it be erroneous.¹⁷ Though such statements as these may not quite evidence a rule of binding precedent, they do indicate a tendency to adhere to previous decisions which go beyond respect for custom repeatedly approved as reasonable. It would seem that the claims of parliamentary sovereignty had begun to convince the judges they were not participants in jurisdiction, but rather expositors of a common law sustained if not created by parliamentary will, and which once declared could not be changed without a parliamentary act.

III

Equity theory and practice suffered a much more appreciable change during the Stuart period than did the common law. The decision of James I to permit the Chancellor to be judge of his own competence¹⁸ opened the way to an enlargement of the subject matter of equity. At the same time, how-

ever, equity ceased to be the court of conscience which it had been declared to be by Christopher St. Germain in his *Dialogues between a Doctor of Divinity and a Student of the Law* (1523)¹⁹ and which it had continued to be until the end of the Tudor period. The statements of the chancellors are quite instructive on this score. Clarendon in 1663 refused relief, though he thought conscience demanded it, because he could not find a precedent.²⁰ In 1670 Lord Keeper Bridgman affirmed the need to follow precedent even in reply to Chief Justice Vaughan's expression of astonishment that precedents should be cited in equity.²¹ Lord Nottingham just two years later articulated the divorce of equity from the chancellor's personal appreciation of justice according to conscience: "With such a conscience as is only *naturalis et interna*," he declared, "this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures; and it is infinitely better for the public that a trust security or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor."²² This was a long way from the spirit of equity expressed in St. Germain. Its very function in the distributed authority of jurisdiction had been vitiated, for the adjustment of the general rule of law to justice in the particular case was no more a part of legal theory. Sixty-two years later, in 1734, Jekyll, Master of the Rolls, insisted that the only discretion which could be permitted in Chancery was that according to law and right; discretion beyond this point was not in any judicial body, not even in the House of Lords in its judicial capacity.²³ Obviously this statement was stronger even than Nottingham's. It affirmed that parliament alone might enlarge upon the law. The jurisdiction of equity in the medieval sense

was gone. All that remained was the authority to apply and adjust the known rules of equity, which thereafter became but another branch of the English law.

It would seem difficult to account for this attitude except in terms of the influence of the change in thought about the constitution and the nature of fundamental law. Before the Stuarts the notion of fundamental law included the idea of the constant readjustment of the rules of law in the interest of good order in the particular case. This was the function of the chancellor. Here we have the chancellor deprived of authority to do equity. The explanation for this must include, at least, a reflection of the feeling that jurisdiction, in the medieval sense, if not the power to make law, belongs to the parliament alone.

IV

The developments with regard to the position of statutes were not as obvious as those in equity precisely because Parliament claimed only supreme jurisdiction and not exclusive jurisdiction to declare the law. In this respect it is instructive to contrast the changes in the roles of legislative assembly, courts, and equity in France after the Revolution of 1769. The French bourgeoisie placed in the legislative assembly not simply the supreme, but the exclusive jurisdiction to declare a positive law for France in conformity with secular natural law. To minimize infringement on this exclusive jurisdiction they enacted extensive systematic legislation, refused to admit its insufficiency for any situation, and denied to the courts any role as interpreter of the law or as dispenser of equity. The courts were to apply the law specified by the legislature and were not to avoid its words under the pretext of following its spirit. Nor could a judge refuse to decide a

case on the ground that no law existed on the subject; the situation had to be fitted under a legal text.²⁴ In England, on the other hand, Parliament did not attempt very comprehensive reforms until the beginning of the nineteenth century. It was content to allow the courts and the chancellor to apply the traditional common law and the settled principles of equity. Perhaps a partial explanation for this difference of events in England and France lies in the fact that whereas in France the pre-revolutionary courts had been viewed as instruments of the crown, in England the courts and the lawyers for the most part had been champions of parliamentary right against the claims of the crown. It hardly could have been expected that Parliament would then have proceeded to destroy its main support. Besides, the common lawyers were very influential in Commons and it is well known that lawyers abhor radical changes which render valueless their hard-earned knowledge of their art. In any event, the rise of parliamentary supremacy in jurisdiction did not result in any great attempt to restate the law. It is true that Francis Bacon had written of the need for codification,²⁵ but he had been on the side of James I. It is also true that Cromwell's parliament had proposed extensive legislative reforms, but after the Restoration these plans were largely forgotten.²⁶ Thus it is not in the systematization of the law by statutes, nor even in their proliferation, that we must look for clues to the relation of statutes to the rest of the law in the Stuart century.

The one factor which seems significant on this point during the Stuart reigns was the controversy over the right of the courts to control a statute of parliament or to declare it void as being contrary to fundamental law. Indeed, it may seem paradoxical that at the same time that parliament was coming to be recognized as having the fullness of jurisdiction

to declare the law that it was being alleged that parliament could not validly make some things law. But there was no paradox in this at all. Though the parliament may have acquired supreme jurisdiction, its function was still *jus dicere*, not *jus dare*. Whereas it could declare the law as it would as long as its specification conformed to just changes in the fundamental law's exposition, it could not make right what was intrinsically wrong. Thus early in the reign of James I Parliament had given its approval to a patent of the king permitting the London College of Surgeons to try and to fine persons for practicing without a license from the college and to keep a portion of the fine. Acting pursuant to this authority, the college imposed a fine on one Dr. Bonham. Dr. Bonham attacked the validity of the college's action and Coke ruled it fundamental that no one could be judge in his own suit and accordingly that Parliament could not make this the law.²⁷ This happened before Parliament achieved sovereign jurisdiction, it is true, but the same sentiments were repeated, and very strongly, after the Restoration. Thus Vaughan, C. J., in *Thomas v. Sorrell* (1677), stated that Parliament could order nothing intrinsically wrong, such as "murder, stealing, perjury, trespass," and that a law so ordering "would be a void law in itself."²⁸ Holt, C. J., in *City of London v. Wood* (1701), voiced the opinion that Parliament could neither permit one to be judge in his own cause, nor make adultery lawful;²⁹ and in *Rex v. Earl of Banbury* (1695), Holt, C. J., has been reported to have said it was common for judges to "construe and expound acts of parliament, and adjudge them to be void."³⁰ It has been said that in spite of such expressions no English court has ever declared an act of parliament void, and this may be literally true; yet to refuse to apply a statute as written, though the import of its words be clear, is at least

an affirmation that the statute will not be considered enforceable as written; and this would seem to amount to the same thing. In any event the courts' view must have been that Parliament could not make law, for if it could, the statute's justice could not have been discussed; nor could it, obviously, have declared a law which was unjust, for this would have been invalid as a misuse of function. Thus it would seem reasonable to conclude that at the end of the Stuart century an act of Parliament was still a *declaration* of law; and the mere fact that Parliament was considered to have the exclusive sovereign right to declare the law did not deprive the courts of the right to state that what a statute declared could not be the law. The victory of Hobbes and his followers was not to be until the nineteenth century. Only then did law come to be regarded as having its source and norm in the will of the secular authorities.

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NOTES

1. Especially J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955); John Dykstra Eusden, *Puritans, Lawyers, and Politics in Early Seventeenth-Century England* (New Haven, 1958). Also to be mentioned is J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, 1957).
2. The notion of *jus dicere* as opposed to *jus dare* is forcefully brought out in Charles Howard McIlwain, *The High Court of Parliament* (New Haven, 1910), and *Constitutionalism: Ancient and Modern* (Ithaca, 1947), Chap. IV.
3. Pope Boniface VIII, Bull *Unam Sanctam* (1302). An excellent short summary of the relations of spiritual and temporal authority is to be found in Otto Gierke, *Political Theories of the Middle Ages*, Maitland trans. (Cambridge, 1927) pp. 9-15. See, for the doctrinal basis of this claim of the spiritual authority, Walter Ullman, *Medieval Papalism* (London, 1949). The seventeenth century statement of the Church's position was made by

Robert Cardinal Bellarmine in his *Tractatus de Potestate Pontificis* (1610), significant excerpts from which are reproduced by Charles Howard McIlwain in his Introduction to *The Political Works of James I*, Harvard Political Classics reprint (Cambridge, 1918) xxii, xxiii.

4. The medieval English constitution, the supremacy of law, and the distribution of the authority of jurisdiction under law are extremely well explained in Eusden, *op. cit.* Chap. 6, note 1.
5. This may be considered the burden of Charles Howard McIlwain's *The High Court of Parliament* (New Haven, 1910). The author's summary is at pp. vii, viii. Coke could still regard parliament as a court reaching decisions on the law (Fourth Institute, 1644). The practices of judges in interpreting and applying statutes lead necessarily to the conclusion that statutes were regarded as the highest expressions of the law, but not more. See the tract, *A Discourse upon the Exposition and Understanding of Statutes* (attributed to Lord Ellesmere), and the introduction by its editor, Samuel E. Thorne (San Marino, Cal., 1942); Theodore F. T. Plucknett, *A Concise History of the Common Law* (5th ed., Boston, 1956) pp. 315-341; Gough, *op. cit.* Chap. II, note 1; and Eusden, *op. cit.*, p. 137, note 1. It would seem that the notion of participation in jurisdiction by agencies with different functions accords logically with the conception of a source of order for man outside human institutional power. Thus such diverse systems as the Canon Law and the Soviet Law admit of distinctions of functions in jurisdiction, but not of a division of powers as to law into legislative, judicial, and executive. See Charles Journet, *The Church of the Word Incarnate*, Vol. I (New York, 1955), pp. 184-186, and René David, *Le Droit Soviétique* (Paris, 1954) pp. 159-167. Conversely, the division of powers would appear to be founded on the epistemological and ontological uncertainty which developed only with the Renaissance and Reformation.
6. Cf. Pocock, *op. cit.* Chap. II, note 1, particularly at pp. 35, 36.
7. On the difference between ideal type natural law of the late seventeenth and eighteenth centuries and concrete fundamental law, see the excellent exposition in Eusden, *op. cit.*, note 1, Chap. 2, pp. 44-49, and Chap. 6, especially pp. 130-141.
8. Eusden, *op. cit.*, p. 47, note 1. It may be of interest to note that the notion of a fundamental law, alterable in particulars, but not repealable in totality, appears to have made the basis of a decision of the supreme court of Louisiana in 1839. The state legislature had enacted a statute repealing all the civil laws formerly in force in the State and not contained in the several

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codes and other statutes enacted from 1803 to 1828. The judgment was that whereas the legislature could make new laws, it could not repeal the background common law of Rome, France, and Spain in force in Louisiana because it had not enacted it. *Reynolds v. Swain*, 13 La. 193, 198 (1839).

9. The literature on the theories of James I is immense. The writings of James himself have been reprinted under the title of *The Political Works of James I*, with an introduction by Charles Howard McIlwain, in the Harvard Political Classics (Cambridge, 1918). The classical work is that of John Neville Figgis, *The Divine Right of Kings* (2nd ed. Cambridge, 1922). The claims of James I and the question of fundamental law are particularly discussed in Gough, *op. cit.*, Chap. IV, note 1. See also Mosse, *The Struggle for Sovereignty in England* (East Lansing, 1950), Chap. IV.
10. Coke's version of the encounter is reproduced in Tanner, *Constitutional Documents of James I*, 186-187; the writer has used the account in Eusden, *op. cit.*, pp. 92-93, note 1.
11. On the matter of unwritten English law much reliance has been placed on Plucknett, *op. cit.*, pp. 342-350, note 5.
12. *Slade v. Morely* (1602) Yelv. 21.
13. Plucknett, *op. cit.*, p. 348, note 5.
14. *Slade's Case* (1596), 4 Rep. 91.
15. W. S. Holdsworth, *A History of English Law*, Vol. VI (Boston, 1927), p. 414.
16. *Godden v. Hales* (1686) 11 S. T. 1254.
17. *Bole v. Horton* (1670) Vaughan 360, 382.
18. Holdsworth, *op. cit.*, Vol. I (Boston, 1931) pp. 461-463, note 15.
19. Holdsworth, *op. cit.* Vol. IV (Boston, 1924), pp. 279-281, note 15.
20. *Roberts v. Wynn* (1663) 1 Ch. Rep. 236.
21. *Fry v. Porter* (1670) 1 Mod. 300 at 307.
22. *Cook v. Fountain* (1672) 3 Swanst. 585, at 600.
23. *Cowper v. Cowper* (1734) 2 P. Wms. 685-686.
24. The textual or statutory implementations of this theory of the supremacy of legislative enactments is quite interesting. Article 4 of the *Code Civil* (1804) provides that the judge who shall refuse to decide a case on the ground that the law is insufficient will be deemed guilty of and punishable for a denial of justice to the parties. Equally significant is the fact that Article 11 of the Preliminary Book, Title V, of the Government's draft proposal for the *Code Civil* (*Projet du Gouvernement*, 1800), which would have authorized the judge to resort to "equity" in the absence of an applicable text, was omitted from the *Code Civil* as finally adopted. Moreover, Articles 10 and 12

of the Law of August 16-24, 1790, forbade judges to take part "directly or indirectly" in the exercise of legislative power and expressly denied them power to interpret a law. Essentially the same idea is expressed in Article 5 of the *Code Civil* which forbids the issuance of opinions on the meaning of a law and which therefore restricts the court in any case to a statement that a certain text applies to the facts with a certain result.

25. Bacon's ideas on codification, expressed in his *De Augmentis*, are summarized in Holdsworth, *op. cit.*, Vol. V (Boston, 1927) pp. 487-488, note 15.
26. See generally W. S. Holdsworth, *op. cit.*, Vol. VI (Boston, 1927) pp. 412-430, note 15.
27. Bonham's Case (1610) 8 Rep. 118.
28. Thomas v. Sorrel (1673) Vaughan Rep. 330.
29. City of London v. Wood (1701) 12 Mod. 669.
30. R. v. Earl of Banbury (1695) Skin. 517, 527.